APPENDIX

[134 A.C.A. 181]

In the District Court of Appeal of the State of California
First Appellate District, Division Two

1 Civil No. 16297

Pacific Gas & Electric Company, a corporation,
Appellant,
v.
State Board of Equalization,
Respondent.

OPINION

[182] Nourse, P. J.—The Pacific Gas and Electric Company, hereinafter called the Company, appeals from a judgment denying its action for refund of sales tax paid in the amount of $324,953.94 plus interest, on the ground that said action was barred by the provisions of section 6933 of the Revenue and [183] Taxation Code. Said section requires the court action to be brought by the claimant within 90 days after the mailing of the notice of the State Board of Equalization's action upon the claim and provides further: "Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments." It is undisputed that a notice of disallowance of claim for refund was mailed by the State Board of Equalization, hereinafter called the Board, on May 7, 1951, that it was received at the Company's principal

act on it is the risk of the addressee corporation and depends on its care. In this case it is conceded that the address to which the notice was addressed was that of appellant's principal office.

Appellant next contends that because section 6906, *supra*, requires service of notice "on the claimant" this means on the claimant as such at the address which appears in the records of the Board on the claim for refund. The contention is wholly without merit. The "claimant" in section 6906 and the "retailer" etc. in section 6486 are descriptive of the same party in interest, here the Company. Appellant's claim for refund states, at the top, names and addresses of counsel, as pleadings often do, but such addresses of counsel do not normally constitute the address of the party, if they are not expressly designated as such. The facts in this case make it especially clear that appellant did not designate another ad [185] dress as its own, than its main office address at 245 Market Street. The names and addresses of counsel at the head of the claim for refund read:

"Chaffee E. Hall
351 California Street
San Francisco 4, California
GArfield 1-2470
Robert H. Gerdes
Richard H. Peterson
John A. Sproul
245 Market Street
San Francisco 6, California
SUtter 1-4211"

The claim for refund was transmitted to the Board by a letter signed by Robert H. Gerdes which letter bears the letterhead:

"Pacific Gas and Electric Company
245 Market Street
San Francisco, California"

It also contains in small print the name of Mr. Gerdes as general counsel and of 10 associate attorneys among whom are Messrs. Peterson and Sproul. From the above the only sensible conclusion the Board could make was that 245 Market Street was the address of the Company and of the members of its legal staff which acted as counsel and that 351 California Street was the address of the outside counsel Mr. Hall. If the matter presented any question of fact it was resolved against appellant by the finding: "The Notice of Denial of Refund was mailed on May 7, 1951, to the retailer, the Company, at its main office and its address as shown on the records of the Board, 245 Market Street, San Francisco, California." As sections 6906 and 6486 provide for notice by mailing addressed to the party and not to its counsel, the above manner of addressing was the correct one. The sections do not contain any indication of a duty to mail to more than one address for one party, as also contended by appellant.

Appellant further relies on the words in section 1013 Code of Civil Procedure: "addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence." As we have held that appellant did not give on any document as its office address an address other than 245 Market Street, and that that address is also the place of appellant's residence (principal place of business) and its [186] address as shown on the records of the Board, the point is without importance and we need not decide what

relation exists between the quoted provision of section 1013 Code of Civil Procedure and the provision of section 6486 Revenue and Taxation Code that the notice should be addressed to the party "at his address as it appears in the records of the board."

Appellant next contends that to the notice in this case is applicable the provision of section 1015 Code of Civil Procedure which provides that in all cases where a party has an attorney in an action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except certain papers not here involved. This is not so. Section 6486 Revenue and Taxation Code provides for service by mailing to the address of the party and refers to section 1013 Code of Civil Procedure, which also provides for service by mailing to the address of the party, but it does not refer to section 1015 Code of Civil Procedure, which provides for service on the attorney of record. The latter provision inconsistent with the provision specifically governing the service of notice in this case cannot be applicable. In *Lyydikainen v. Industrial Acc. Com.*, 36 Cal. App. 2d 298 [97 P.2d 993], which case held section 1015 applicable to mailing of papers in proceedings before the Industrial Accident Commission, there were references to the whole chapter in which section 1015, *supra,* is contained so that it was made directly applicable, and there were no conflicting provisions.

We find nothing unreasonable or against common sense or good faith in a construction of the statute which upholds the addressing of an important paper to the address of appellant's main office, which is also the office of its legal staff. That the notice did not reach that staff or appellant's outside counsel although it was correctly delivered, seems the fault of appellant and its employees only.

Appellant predicates the invalidity of the notice also on alleged defects in its content, to wit that it did not contain a proper designation of the transaction to which the Board's decision related as contained in the caption of the claim for refund, and because the notice was not dated. There is no statutory provision regulating requirements of form or content of such notice. With respect to the comparable notice of entry of judgment it has been held that any notice in writing which will convey to a losing party that the judgment has been entered is sufficient. (*Bank of America v. Superior Court,* 115 Cal. [187] App. 454, 457 [1 P.2d 1081].) The notice identified the matter as "the claim for refund filed by Pacific Gas and Electric Company, 245 Market Street, San Francisco, California in the amount of $324,-953.94," and notified appellant that on Wednesday, April 18, 1951, its claim for refund under the Sales and Use Tax Law, in said amount, was denied. There can be no doubt that for appellant the amount set forth clearly and specifically identified the claim which was denied and that in that respect the notice was sufficient in law. Insofar as in this respect any matter of fact was presented the court below found in substance that the notice was reasonably certain to give the Company the required information, which finding is supported by the text and circumstances of the communication.

There is no statutory requirement that the notice be dated and the failure to start the action timely was evidently not caused by the lack of a date.

We hold that the statutory method of service of a notice of disallowance of claim by mailing addressed to the party, as here applied to the Company, is just and reasonable and satisfies due process and that, although addressing a notice to counsel contrary to or in excess of the statutory require-

ments might in this case have prevented the injury, due process did not require respondent to take such a measure, the less so because the manner in which the injury occurred was not readily foreseeable and was caused by the lack of care of appellant's employees. With respect to the content of the notice appellant is not entitled to raise the constitutional question of due process because its rights were not injuriously affected by any alleged defect in the content, but only by the fact that the notice did not reach its counsel. (*American Distilling Co. v. Johnson,* [1]132 Cal. App. 2d —, — [281 P.2d 598]; 11 Cal. Jur. 2d, Constitutional Law, § 68.)

Appellant contends that the Board was estopped from relying on the 90 days' limitation from the mailing of its notice, because the notice was not given according to the precedent established by the Board of sending a copy of a notice, properly dated and informative, to appellant's outside counsel Mr. Hall. There is no merit whatever in this contention. The existence of facts constituting an estoppel was rejected in the findings. "The existence of an estoppel is a question of fact" (*Parke v. Franciscus,* 194 Cal. 284, 297 [228 P. 435]). Unless the opposite conclusion is the only one which can reasonably be drawn from the facts, the finding of the trial court [188] is binding on this court. The evidence does not show conclusively or at all the establishing by the Board of a precedent as to the giving of notice on which appellant was entitled to rely and on which it relied to its detriment. The Board had sent the notice of deficiency determination, which gave rise to the controversy, to the Company at its Market Street address; it had acknowledged receipt of the Company's petition for redetermination addressed to Richard H. Peterson, Associate

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[1]Advance Report Citation: 132 A.C.A. 85, 91.

Attorney, Pacific Gas and Electric Company at the Market Street address; it had sent the notice of hearing on said petition to the Company at its Market Street address; it had addressed the ribbon copy of the notice of redetermination denying said petition to the Company, at its Market Street address, indicating on it that a carbon copy was being sent to the attorney Mr. Hall at his address and the carbon copy had been sent to Mr. Hall with an explanatory letter; the Board had acknowledged receipt of the Company's claim for refund to the Company at its Market Street address. It cannot be said that, because the Board had once sent a copy of a notice to the Company's outside attorney, mentioning on the notice to the Company itself that such was being done, the Company could rely on such copy being sent also when the notice of denial of claim for refund which the Company received at its office did not mention the sending of such copy. There is, moreover, no evidence that the high employees of the Company who took notice of the denial of the claim of refund failed to communicate it to the Company's attorneys because of their reliance on the sending of such copy. We held earlier that the alleged defects in the content of the notice could not be held responsible for said failure.

As another ground of estoppel appellant proposes the following facts:

When in July, 1951, Mr. Carr, the manager of the Company's Tax Department, not knowing of the disallowance having been decided and noticed, inquired from the secretary of the Board, Mr. Pierce, whether he had any objection to Mr. Carr's speaking to the members of the Board concerning the placing of the claim for refund on the calendar, so that it would be taken up immediately, Mr. Pierce said that he had no objection. When thereafter on July 16,

1951, Mr. Carr informally met three members of the Board in a hotel in Sacramento, Mr. Bonelli, one of the members of the Board, who had not been present at the denial of the claim for refund, stated that at any time the Company wanted the Board to exhaust the administrative remedy in order that the Com [189] pany could go to court, the Board would be glad to do so. The other two members of the Board present acquiesced in Mr. Bonelli's statement. Mr. Carr did not discuss the status of the claim for refund with the Sales Tax Administrator or any other member of the staff of the Sales Tax Division of the Board. The rejection of any estoppel by the trial court is conclusive of this point as well as of the prior one. It cannot be said that no other conclusion from the above facts is possible than that they cause an estoppel. Litigants normally do not rely and are not necessarily entitled to rely for the time of exercising their remedies on implications of informal conversations with Board members. The trial court could reasonably conclude that the failure to timely start the court action was not caused by any reliance on the stated conversation but by reliance of appellant's counsel on the fact that they had not received notice of disallowance of claim. It is also doubtful whether such informal utterances should be considered as acts of and binding on the Board as such.

As we are bound by the decision of the trial court that there was no factual basis for any estoppel, we need not decide whether facts which normally cause an estoppel could, if proved, have overcome the limitation provision of section 6933 of the Revenue and Taxation Code.

Judgment affirmed.

DOOLING, J., and KAUFMAN, J., concurred.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1955

No. 613

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal First Appellate District, State of California

MOTION TO DISMISS

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PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
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STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal First Appellate District, State of California

MOTION TO DISMISS

Appellee, State Board of Equalization, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss the appeal in the above entitled case on the grounds: (a) that the appeal does not present a substantial federal question; and (b) that two of the three federal questions sought to be raised were neither timely or properly raised, nor expressly passed on by the court below.

STATEMENT OF CASE

This case involves a notice of denial of a claim for refund of sales tax which was mailed on May 7, 1951, pursuant to statute by the State Board of Equalization (sometimes hereinafter referred to as the "Board") to Pacific Gas and Electric Company (sometimes hereinafter referred to as the "Company") at its address as shown on the records of the Board, 245 Market Street, San Francisco, California (Pltf.'s Ex. 1, Doc. 19; Finding XII, Cl. Tr., p. 24, ll. 23-26).[1] The notice was received by the Company on May 8, 1951, and the notice was read and its contents were noted by the general auditor of the Company, the comptroller of the Company, the assistant auditor of the Company and the chief clerk of the Company (R. Tr., p. 30, l. 12—p. 31, l. 13; Finding XII, Cl. Tr., p. 24, l. 23—p. 26, l. 6). Thereafter, the notice was placed in the Company's files and apparently forgotten.

The general auditor of the Company had previously read and noted the deficiency assessment notice sent by the Board to the Company which initiated the sales tax controversy (R. Tr., p. 31, ll. 6, 7; Finding I, Cl. Tr., p. 19, l. 23—p. 20, l. 15); he actually had made the payment of $324,953.94 tax assessed to the Board (R. Tr., p. 22, l. 23—p. 23, l. 2; Finding VIII, Cl. Tr.,

[1] The abbreviation "Cl. Tr." refers to the Clerk's Transcript and the abbreviation "R. Tr." refers to the Reporter's Transcript.

p. 23, ll. 3-6) and he had read and noted the acknowledgment of the claim for refund sent by the Board to the Company (Pltf.'s Ex. 1, Doc. 16; Finding X, Cl. Tr., p. 24, ll. 5-12).

Although the notice of denial of the claim for refund was actually received by these responsible employees of the Company on the day after the mailing of the notice, the Company did not bring its sales tax refund recovery action within 90 days after the mailing of the notice as required by Section 6933 of the Revenue and Taxation Code of the State of California, but it brought suit on the 179th day after the mailing of the notice (Finding XIV, Cl. Tr., p. 27, ll. 10-13).

While the evidence presented at the trial in the main was undisputed, there was wide variance between the Company and the Board as to the emphasis to be placed on certain of the evidence and as to the inferences which could be drawn from the evidence. The conflict was resolved by the trial court in the Board's favor and each of the trial court's findings was drawn fairly and reasonably from the evidence. The District Court of Appeal also rejected the Company's contentions and a petition for hearing filed by the Company was denied by the Supreme Court of the State of California.

THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

Three questions are suggested by the Company as presented by this appeal.

The Company's first contention is that the notice was defective in manner of service and content and did not afford its procedural due process of law. This contention does not raise a substantial federal question because the evidence established and the lower courts found that the notice was not only reasonably certain to inform the Company but, in fact, did inform the Company that its claim for refund had been denied.

The Company's second contention is that it was denied due process of law because it allegedly relied on the informal conversation of a Board member which led it to believe that its refund had not been acted upon although at the time the claim had been denied. This contention does not raise a substantial federal question because none of the elements essential to invoke the doctrine of estoppel was demonstrated to exist by the Company. Moreover, the application of the doctrine of estoppel as a matter of constitutional law was not raised by the Company or passed on by the courts below.

The Company's third contention is that in administrative proceedings generally, notice must be served on counsel of record and notice served on the party

to the proceedings is violative of procedural due process of law. This contention does not raise a substantial federal question. There is no authority for such a startling proposition which would invalidate a wide variety of legislation and judicial and administrative proceedings based thereon, both federal and state. In addition, this general contention was not raised by the Company below or passed on by the courts below as a matter of constitutional law or otherwise.

I. THE NOTICE INFORMED THE COMPANY THAT ITS CLAIM FOR REFUND HAD BEEN DENIED.

A. THE NOTICE WAS NOT DEFECTIVE IN MANNER OF SERVICE

The Company contends that the notice was defective in manner of service and asserts that the notice was not mailed to counsel of record; that the addresses of counsel were the only addresses designated on the claim for refund; that counsel of record were the Company's only authorized representatives and that the Board had mailed a copy of another notice issued by it earlier in the proceeding to counsel.

It is manifest that the Board followed exactly the requirements of Section 6486 of the California Revenue and Taxation Code by mailing the notice to the Company at its main office and its address as it appeared in the records of the Board. Moreover, such address was also the address of the Company's legal

staff which acted as its counsel and was the address which appeared on the claim for refund, although a different address for outside counsel engaged by the Company also appeared on the claim for refund.

The lower courts found that the persons who actually received, read and noted the notice on behalf of the Company were acting within the sphere of their authority (Finding XV, Cl. Tr., p. 27, ll. 15-21). This finding clearly was reasonable in view of the evidence that at least one of the recipients of the notice was the comptroller of the Company and another was the general auditor of the Company who had, in fact, made the payment of $324,953.94 sales tax assessed to the Board.

The record is devoid of any evidence that the neglect of the Company's employees to call the notice to the attention of its legal staff was due to the fact that the Board, in addition to mailing to the Company another notice issued by it earlier in the proceeding, had also mailed a copy of that notice to outside counsel.

B. THE NOTICE WAS NOT DEFECTIVE IN CONTENT

The Company contends the notice was defective in content and asserts that the notice did not identify the claim; that it did not specify the date it was mailed and that it did not state that action must be brought within 90 days from the date of mailing.

The notice definitely stated that the claim for refund filed by Pacific Gas and Electric Company under the Sales and Use Tax Law in the amount of $324,953.94

was denied on April 18, 1951. It is certain that the Company did not have more than one claim for refund pending at that time under the Sales and Use Tax Law involving the amount of $324,953.94, and this clearly afforded a ready identification of the claim. When this is coupled with the fact that the notice reached responsible employees, including one who had read and noted the notice of deficiency determination, who actually had made the payment of $324,953.94 tax assessed to the Board and who had read and noted the acknowledgment of the claim seeking refund of the amount of $324,953.94, it is apparent that the Company's contention lacks merit.

The Company complains that the date of mailing did not appear on the notice. The date of mailing, however, was easily ascertainable from the postmark date on the envelope. Moreover, the date of denial of the claim for refund appeared on the notice (a date which obviously always would be prior to the date of mailing), thus providing a definite guide for a cautious taxpayer. In addition, this action was brought by the Company long after 90 days from the *receipt* of the notice by the Company.

Finally, the Company for the first time here asserts that the notice did not state that action must be brought within 90 days from the date of its mailing. Apart from the failure to raise this contention in the lower courts, the contention loses much of its force when it is observed that the California sales tax

statute from 1939 to the present time has provided for a 90 day period within which a refund action must be brought (Calif. Stats. 1939, p. 2184). From 1933, the date of original enactment, until 1939, the sales tax statute required an action to be brought within 60 days after payment of the tax under protest (Calif. Stats. 1933, p. 2610).

II. THE SUGGESTED QUESTION OF THE APPLICATION OF THE DOCTRINE OF ESTOPPEL AS A MATTER OF CONSTITUTIONAL LAW AND THE SUGGESTED QUESTION OF WHETHER NOTICE SERVED ON THE PARTY TO ADMINISTRATIVE PROCEEDINGS FULFILLS THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW WERE NOT RAISED BY THE COMPANY IN OR PASSED ON BY THE COURTS BELOW. MOREOVER, EACH OF THE CONTENTIONS LACKS MERIT.

A. INTRODUCTION

The application of the doctrine of estoppel as a matter of constitutional law was not raised by the Company or passed on by the courts below. This also is the case with respect to the contention of the Company that notice served on the party to administrative proceedings generally but not also on his counsel is violative of procedural due process of law.

Although the contentions are raised for the first time in this Court, for the sake of completeness, we shall briefly discuss each of them.

B. THE DOCTRINE OF ESTOPPEL HAS NO APPLICATION TO THE FACTS HERE PRESENTED

None of the essential elements of estoppel were demonstrated by the Company to be present in this case, and the trial court specifically found that there were no acts, language or silence on the part of the Board amounting to misrepresentation or concealment of material facts concerning the denial of the claim for refund. Furthermore, the trial court found that the Company received and had on May 8, 1951, notice and knowledge of the denial of the claim for refund. (Finding XVII, Cl. Tr., p. 28, ll. 4-8.)

The finding of the trial court was entirely proper based on the evidence because there were no acts, language or silence of the Board amounting to misrepresentation or concealment of material facts, nor were the facts unknown to the Company. In actuality, the notice of denial of the claim for refund was mailed to the Company in the manner and form required by law, and it was received and noted by responsible employees on behalf of the Company. Because of the Company's actual notification, the informal statement of a member of the Board that the Board would act soon on the claim has no materiality.

C. NOTICE SERVED ON THE PARTY TO ADMINISTRATIVE PROCEEDINGS FULFILLS THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW

As its final contention, the Company asserts that in administrative proceedings generally, service of notice

on a party but not also on his counsel is violative of procedural due process of law. No authority has been cited by the Company for this proposition and we believe there is none. If the rule were as the Company suggests, a veritable legion of federal and state legislation and judicial and administrative proceedings based thereon would be invalid.

As illustrative, in some jurisdictions statutes require personal notification of a party to judicial proceedings and preclude notice to counsel.[2] In other jurisdictions, statutes simply requiring that notice of steps in judicial proceedings be given to the adverse party have been interpreted to preclude service on the attorney.[3] There is no requirement in the Administrative Procedure Act (5 U. S. C. Sec. 1001 et seq.) for notification to other than an interested party. The Internal Revenue Code of 1954 and its predecessors require notification of the assessment of deficiencies and the denial of claims for refund only to the taxpayer.[4]

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[2] *Miles* v. *Caraker* (1907) 82 Ark. 198, 101 S. W. 174; *Cullen* v. *Collison* (1904) 110 Mo. App. 174, 80 S. W. 290; *State* v. *Gray* (1941) 71 Okla. Cr. 309, 111 P. 2d 514; *First National Bank* v. *Lester* (Tex. Civ. App., 1915) 179 S. W. 684; *J. B. King & Co.* v. *C. W. Hancock & Sons* (1913) 114 Va. 596, 77 S. E. 510; *Webb* v. *Ritter* (1906) 60 W. Va. 193, 54 S. E. 484, 498.

[3] *Tate* v. *Hamlin* (1895) 149 Ind. 94, 41 N. E. 356, 1035; *Imboden* v. *Renshaw* (1903) 102 Mo. App. 173, 76 S. W. 701.

[4] Sections 6212, 6352, Internal Revenue Code of 1954; see *Parker* v. *Commissioner* (1949) 12 T. C. 1079, 1082.

CONCLUSION

It is respectfully submitted that the appellant presents no substantial federal question for the decision of this Court and that the appeal should be dismissed.

Respectfully submitted,

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